

Defamation action against family members of nursing home resident dismissed (*Fiddick Nursing Home Ltd. v. Moore*)

Anti-SLAPP | Defamation | Dismissal of Action | Litigation | Litigation & Dispute Resolution | Torts

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The COVID-19 pandemic resulted in a lot of media coverage about the care provided to seniors in nursing homes. Seniors were extremely vulnerable to the virus and illnesses to nursing home employees caused severe staff shortages in those homes. In response to the pandemic, military personnel were called to provide relief to the staff shortages, and governments and nursing homes were required to implement restrictions on family member visitations. In some cases, the restrictions were questioned and nursing homes became the target of comments and statements about the care being provided within their respective facilities.

In *Fiddick's Nursing Home Ltd. v. Moore*, 2024 ONSC 792, the defendants had expressed their dissatisfaction of the plaintiff's restrictive policies on Twitter and in newspaper interviews. They contended that the plaintiff nursing home was overly restricting access to residents and causing them harm due to increased isolation. Among other things, the defendants accused the nursing home of being a "culprit" and a "control freak".

The nursing home sued the defendants for defamation and interference with economic relations. The defendants brought an anti-SLAPP motion under [section 137.1](#) of the *Courts of Justice Act* ("CJA") to dismiss the claim. The motion judge found in favour of the defendants.

An anti-SLAPP motion places an initial burden on the defendant to demonstrate that the proceeding arises from an expression that relates to a matter of public interest. If this threshold is met, the burden shifts to the plaintiff to show under [section 137.1\(4\)](#) that:

- a. There are grounds to believe that the proceeding has substantial merit;
- b. There are grounds to believe that there are no valid defences to the claims; and
- c. The harm suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the plaintiff's action to proceed outweighs the public interest in protecting the defendant's expression.

With respect to the defendants' burden, the nursing home contended that its claim was purely about a private dispute between the parties and not a matter of public interest. The motion judge rejected this argument, finding that the defendants' expressions were related to the pandemic and the public interest in the quality of care that was being provided in long-term care homes at the time of the pandemic.

Furthermore, the motion judge found that it was self-evident that the defendants' expressions related to a matter of public interest because at the time of the expressions, the Ministry of Long-Term Care had conducted an investigation of the nursing home and issued a report as part of its regulatory mandate. The report contained negative findings against the nursing home, including that the nursing home had failed to ensure that:

- a. every alleged, suspected or witnessed incident of abuse of a resident by anyone that the licensee knew of, or that was reported to the licensee was immediately investigated and appropriate action was taken in response to every such incident;
- b. any person who had reasonable grounds to suspect that abuse of a resident by anyone had occurred or may occur immediately reported the suspicion and the information upon which it was based to the Director; and

c. a resident's right to communicate in confidence, receive visitors of their choice and consult in private with any person without interference was fully respected and promoted.

Accordingly, the plaintiff was required to meet its thresholds under the CJA for the action to continue.

Although the motion judge found that the nursing home's claim for defamation had substantial merit (the claim for economic interference appeared to have been abandoned), the nursing home failed to clear the merits-based hurdle of the test because the defences raised by the defendants had a genuine prospect of success. As well, the nursing home failed to clear the public-interest threshold of the test.

The defendants relied on the hyperlink defence, the bane and antidote defence, the responsible communication defence, the lesser defamatory meaning defence and the fair comment defence. The hyperlink defence, the bane and antidote defence and the lesser defamatory meaning defence are essentially part of the broader defence that the alleged defamatory statements are not defamatory. The responsible communication defence generally applies to protect defamatory comments made by media and the statements of individuals that are published in media reports. The fair comment defence protects a defendant where the following elements are satisfied:

- a. The comment must be on a matter of public interest;
- b. The comment must be based on fact;
- c. The comment, though it can include inferences of fact, must be recognized as comment;
- d. The comment must satisfy the objective test of whether any person could honestly express the same opinion on the proven facts; and
- e. That the comment was not subjectively actuated by express malice.

Without engaging in a detailed analysis of the defences relied upon by the defendants, the motion judge found that the nursing home had failed to show that there were grounds to believe that the defences had no real prospect of success.

In general, as long as one of the defences has a real prospect of success, the plaintiff will be unable to meet its burden under the merits-based threshold.

The finding that the nursing home had failed to clear the merits-based threshold was enough to grant the defendants' motion to dismiss the nursing home's action.

However, the motion judge further considered whether the nursing home was able to clear the public interest threshold. Under this threshold, the nursing home was required to show that the harm likely to be suffered or that had been suffered by it was sufficiently serious that the public interest in permitting the action to continue outweighed the public interest in protecting the defendants' expression.

Although the nursing home contended that the defendants' expressions had caused it grievous reputational damages, the motion judge found that there was no evidence to support this contention. There was no evidence of the nursing home's business reputation before or after the impugned expressions were published and there was no evidence of any actual business losses.

As determined in *Bent v. Platnick*, 2020 SCC 23, on an anti-SLAPP motion the magnitude of the harm suffered by a plaintiff is important in assessing whether the harm is sufficiently serious that the public interest in permitting a proceeding to continue outweighs the public interest in protecting the expression. Accordingly, under the weighing exercise, a plaintiff must provide an evidentiary basis to support the magnitude of alleged harm.

In contrast, the defendants' expression was important. The defendants showed that they had each worked in the health care sector and that they had a specific and an urgent interest in advocating for the family member who lived in the nursing home. Also, the motion judge accepted that the impugned expressions related to issues that affected all residents of long-term care homes during the COVID-19 pandemic.

Lastly, although the motion judge stated that no findings were being made on whether the following were conclusively present, the motion judge noted that the case had the hallmarks of a SLAPP action. There was a financial imbalance that favoured the nursing home. The action had a potential retributory purpose related to the defendants having complained to the Ministry about the nursing home. The nursing home suffered minimal damages.

Overall, the motion judge found that the defendants' expressions were not motivated by malice and that they were sincerely driven by concerns about the welfare of their family member who lived in the nursing home and, in general, all residents of long-term care facilities and their families.

There are a few key takeaways from this case. First, plaintiffs will generally face a difficult challenge in defending an anti-SLAPP motion where their action is connected to expressions made on a highly significant matter of public interest. Second, a plaintiff in responding to an anti-SLAPP motion must ensure that actual



evidence of harm is placed before a court. This is particularly important for a corporate plaintiff because corporate plaintiffs in a defamation action are often asked to prove actual losses connected to a defamatory statement. Without evidence of actual harm, a corporate plaintiff will have difficulty persuading a court that the public interest in allowing its action to continue outweighs the public interest in protecting a defendant's expression. A PDF version is available to download [here](#).

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